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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NYNEX CORPORATION; NYNEX MATERIEL ENTERPRISES COMPANY; NEW YORK TELEPHONE COMPANY,

Petitioners,

—v.—

DISCON, INCORPORATED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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Pursuant to Rule 37 of the Rules of this Court, this brief is respectfully submitted, in support of the Petitioners, by *amicus curiae,* the Association of the Bar of the City of New York. The consent of the parties to the filing of this brief has been requested. Petitioners have given consent; respondent has not.

INTEREST OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

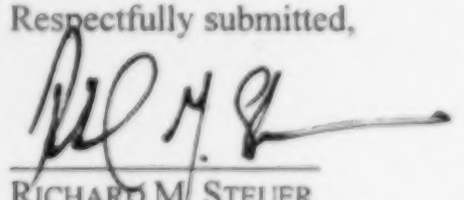
The Association of the Bar of the City of New York (the "Association") is an organization composed of over 21,000 attorneys. While most members of the Association practice in the New York tri-state area, there are members from almost every state and from over 50 foreign countries. The Committee on Antitrust and Trade Regulation, which has participated in studying and shaping antitrust law and trade regulation policy for several decades, is comprised of lawyers with a wide range of perspectives. Members of the Committee include practitioners who represent both plaintiffs and defendants, as well as academicians.

The Second Circuit's August 26, 1996 decision in this matter was brought to the attention of the Association by one of the parties. The Association is concerned that this decision could cause serious confusion with respect to the distinction between horizontal and vertical restraints of trade under Section 1 of the Sherman Act, 15 U.S.C. § 1.

Accordingly, the Association respectfully moves for leave to file the "Brief Amicus Curiae of the Association of the Bar of the City of New York in Support of the Petitioners" which is submitted herewith. The filing of this brief has been

approved by the President of the Association in accordance with Section XIII of the Association's by-laws.

Respectfully submitted,



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The Association of the Bar of the City of New York (the "Association") is an organization composed of over 21,000 attorneys. While most members of the Association practice in the New York tri-state area, there are members from almost every state and from over 50 foreign countries. The Committee on Antitrust and Trade Regulation, which has participated in studying and shaping antitrust law and trade regulation policy for several decades, is comprised of lawyers with a wide range of perspectives. Members of the Committee include practitioners who represent both plaintiffs and defendants, as well as academicians. The Committee, the Association and their members have a substantial interest in the Court's determination as to when a vertical agreement may be treated as a horizontal restraint under the Sherman Act.[1]

SUMMARY OF ARGUMENT

Unless the decision of the Court of Appeals for the Second Circuit with respect to the application of Section 1 of the Sherman Act is reversed, it will have the effect of allowing every supplier that is displaced by an agreement between a customer and a new supplier to seek treble damages based on a violation of the federal antitrust laws. Such suits would target claims of *per se* antitrust liability against lost customers, where the former supplier otherwise would be limited to filing state law claims based on tortious interference against the new

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[1] This brief was not authored in whole or in part by counsel for a party. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

supplier. Because the *per se* rule presumes illegality, the defendants in these cases would be precluded from presenting evidence of justifications.

Of particular concern is the fact that the Second Circuit based its decision on court of appeals cases that were decided prior to this Court's decision in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988). Although the Second Circuit acknowledged the relevance of *Sharp*, it failed to recognize the fact that *Sharp* actually overruled the earlier authority under which a defendant's decision to substitute a new supplier or distributor for an old one could be treated as a horizontal restraint. For these reasons we urge this Court to reverse the decision below and take this opportunity to clarify the law regarding horizontal effects arising from vertical relationships. In particular, we urge this Court to adopt the approach developed over the years by the courts of appeals, applying the rule of reason to cases involving the substitution of a new supplier or distributor for an old one within a vertical relationship.

ARGUMENT

The Association respectfully submits the following comments in support of the Petitioners.

The Court Should Reject Application of the Per Se Rule to "Two-Firm Group Boycotts." Without expressing an opinion on either the appropriate resolution of the motion to dismiss that is the subject of the present appeal, or the ultimate outcome of this litigation, the Association urges the Court to reverse the decision of the Court of Appeals for the Second Circuit, which applied Section 1 of the Sherman Act, 15 U.S.C. § 1, to what that court termed "two-firm group boycotts." 93 F.3d 1055, 1061. The Association's concern is that the Second Circuit's broad formulation as to when a vertical agreement may be treated as a horizontal restraint, crafted *sua sponte* without the benefit of briefing or argument by the parties, and without a full explanation of how it fits within applicable Supreme Court precedent, will have a powerful influence beyond this particular case.

The Second Circuit's decision with respect to the application of Section 1 of the Sherman Act turns on the proposition that an agreement between two firms in a vertical relationship may be characterized as a horizontal restraint if it seeks to disadvantage a competitor of one of the parties to the agreement and has no purpose except stifling competition. Specifically, the Second Circuit observed that "an agreement between two firms . . . even in a vertical relationship, may be characterized as a horizontal restraint of trade if the agreement seeks to disadvantage the direct competitor . . . of one of the conspiring firms," and the court added that such a restraint might fall within "the *per se* rule applied to group boycotts

. . . if the restraint of trade 'has no purpose except stifling competition.'"[2]

The concern raised by this formulation is that it could be interpreted to reach virtually every agreement between a customer and a supplier that displaces another supplier. By a parity of reasoning it also could be interpreted to reach agreements between a supplier and a customer that displace another customer, including a customer that is a distributor. This would invite a flood of federal antitrust litigation seeking treble damages on behalf of jilted suppliers and distributors. These suits would assert claims of *per se* antitrust liability in situations where, at most, the disappointed supplier or distributor otherwise would be limited to pursuing a state law claim against the replacement for tortious interference with business relationships and/or unfair competition. Because the *per se* rule presumes illegality, defendants in these suits would be precluded from presenting evidence of justifications.

What makes the Second Circuit's ruling particularly significant is the fact that it is based on *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d. Cir. 1978), and other cases that were decided before this Court's decision in *Sharp Electronics Corp.*, 485 U.S. at 725-31 & n.4. Although the Second Circuit's opinion acknowledged the relevance of *Sharp*, it did not recognize that *Sharp* actually overruled earlier authority under which a defendant's decision to substitute a new supplier or distributor could be treated as a horizontal restraint. This Court explained in *Sharp* that "a restraint is

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[2] 93 F.3d at 1061, *citing Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 131 (2d Cir. 1978) (en banc), *quoting White Motor Co. v. United States*, 372 U.S. 253, 263 (1963).

horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement" (*i.e.*, an agreement "between competitors"). 485 U.S. at 730 n.4. Further, the majority in *Sharp* explicitly admonished that applying the horizontal label to vertical agreements "introduces needless confusion into antitrust terminology." *Id.* at 730.

The opinion below should be reexamined precisely because it introduces needless confusion by treating a vertical restraint as horizontal on the ground that it has horizontal effects.

The Court Should Take This Occasion to Clarify the Rule Applicable to the Substitution of Suppliers and Distributors. This case presents an appropriate opportunity for this Court to clarify the law applicable to the substitution of a new supplier or distributor for an old one. Although an ample body of law has developed in the lower courts on this subject, this Court has had few occasions to express a view of its own.

Specifically, in *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), this Court held that "in the absence of any purpose to create or maintain a monopoly," it is not a Sherman Act violation for a trader "to exercise his own independent business discretion as to parties with whom he will deal." It took almost seventy years for the Court to add, in *Sharp*, *supra*, that it is neither a horizontal agreement nor *per se* unlawful for a manufacturer to substitute a new distributor for an old one at the behest of the new one. 485 U.S. at 725-31 & n.4.

In between, the law on substitution of suppliers and distributors evolved largely through a series of lower court

rulings. Most prominent was the D.C. Circuit's decision in the *Packard* case. There, the court held that the creation of an exclusive dealership by terminating one distributor at the behest of another was not unlawful, and pointed out that the rule that had evolved in earlier cases was "virtually one of *per se* legality." *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418, 420 (D.C. Cir. 1957) (*quoting* Milton Handler, *Annual Antitrust Review*, 11 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 367, 370 (1956)).

Subsequently, a series of lower court decisions confirmed that the substitution of one exclusive distributor for another normally does not diminish competition and is generally lawful. These decisions culminated in two cases that have been cited with great regularity, *Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F.2d 283 (6th Cir. 1963), and *Burdett Sound, Inc. v. Altec Corp.*, 515 F.2d 1245 (5th Cir. 1975). In *Ace Beer* the court emphasized that "the substitution of one distributor for another in a competitive market . . . does not eliminate or materially diminish . . . existing competition . . . , is not an unusual business procedure, and, in our opinion, is not an unreasonable restraint of trade." 318 F.2d at 287. In *Burdett*, the court admonished:

> Lest any other former distributors succumb to the temptation of treble damages, we reiterate that it is simply not an antitrust violation for a manufacturer to contract with a new distributor, and as a consequence, to terminate his relationship with a former distributor, even if the effect of the new contract is to seriously damage the former distributor's business.

515 F.2d at 1249. Other circuits have held to the same effect.[3]

The message of these cases is that claims based on the substitution of one dealer or supplier for another should be dismissed unless there is a plausible claim of harm to overall competition in the relevant market, not just to one competitor, building on this Court's repeated instruction that the antitrust laws as a whole are intended to protect competition, not competitors. *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458-59 (1993).[4]

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[3] *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 806 (6th Cir. 1988) ("We have consistently held that a complaint which simply alleges that a manufacturer substituted one distributor for another fails to state a violation of the rule of reason, *unless* it also alleges anticompetitive effect at the interbrand level"); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 735 (9th Cir. 1987); *Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc.*, 691 F.2d 241, 243-44 (6th Cir. 1982); *White v. Hearst Corp.*, 669 F.2d 14, 19 (1st Cir. 1982); *DeVoto v. Pacific Fidelity Life Ins. Co.*, 618 F.2d 1340, 1344 (9th Cir.1980); *Northwest Power Products Inc. v. Omark Industries*, 576 F.2d 83, 91 (5th Cir. 1978); *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 803 (9th Cir. 1976).

[4] The complaint alleges that NYNEX and AT&T Technologies sought not merely to prevent Discon from competing for NYNEX's business but to prevent it from competing in the removal services market at all, *see* J.A. 76; *see also* J.A. 84, and it has been argued that if this could be proved, it should result in *per se* illegality regardless of whether the agreement was horizontal or vertical. If this were all that is necessary to plead a case of *per se* illegality, however, it

(continued...)

The gap that exists between the formulation in these cases and the formulation of the Second Circuit in the present case is illuminated by examining the very recent decision in *Electronics Communications Corp. v. Toshiba America Consumer Products, Inc.*, 129 F.3d 240 (2d Cir. 1997), decided after the present case by a different panel of the Second Circuit. There, the court cited the *Burdett* case and agreed that "without a showing of an actual adverse effect on competition market-wide, for a manufacturer to terminate a distributor . . . and to appoint an exclusive distributor" is not a violation of the antitrust laws. Then, as if to highlight the anomalous nature of the *Discon* decision, that panel observed that the *Discon* panel had distinguished the *Discon* case from a case involving "a typical exclusive distributorship arrangement because the conduct alleged [in *Discon*] was manifestly anticompetitive and no procompetitive rationale appeared on the face of the complaint." 129 F.3d at 244-245. This explanation of *Discon* is not sufficiently instructive, however. It suggests a reason why the conduct alleged in *Discon* might not receive as favorable treatment under the rule of reason as the creation of a "typical" exclusive distributorship, but still does not explain

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[4] (...continued)
would subsume the rule of reason in every substitution case in which the terminated supplier or distributor alleges that it cannot replace the business it stands to lose. Indeed, the plaintiff in *Packard* quit the market entirely as a result of its imminent termination. *Packard Motor Car Co.*, 243 F.2d at 419; *see also Ace Beer Distributors, Inc.*, 318 F.2d at 285-86 (allegation that sole supplier's termination substantially destroyed plaintiff distributor); *Burdett Sound, Inc.*, 515 F.2d at 1249 (termination alleged to have seriously damaged plaintiff distributor).

how or why that conduct ever should be subject to a rule of *per se* illegality.

Accordingly, if this Court rejects the Second Circuit's "two-firm group boycott" formulation, it should then consider clarifying what rule is, in fact, properly applicable to the substitution of a new supplier or distributor for an old one.

In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984), this Court embraced a formulation on conspiracy found in the Third Circuit's opinion in *Edward J. Sweeney & Sons, Inc. v. Texaco Inc.*, 637 F.2d 105, 111 n.2 (3d Cir. 1980). In the present case, the Court similarly may choose to adopt the formulation on the substitution of suppliers or distributors found in the D.C. Circuit's opinion in *Packard*, the Sixth Circuit's opinion in *Ace Beer* and the Fifth Circuit's opinion in *Burdett*. This would provide the lower courts greater assurance that in applying the rule of reason to vertical substitution cases in the future, they would be applying that rule in a manner consistent with the interpretations of this Court. It also would provide members of the bar greater guidance for distinguishing between meritorious substitution cases and those that are destined to fail.[5]

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[5] This Court may also take this opportunity to address the Second Circuit's holding that a conspiracy to monopolize claims against a customer under Section 2 of the Sherman Act, 15 U.S.C. § 2, can be based on a vertical agreement between the customer and a new supplier which displaces a previous supplier.

CONCLUSION

Wherefore, the Association respectfully submits that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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